January 15, 2008

Darcy Miner, Director Compliance Monitoring Division Minnesota Department of Health 85 East Seventh Place, Suite 220 St Paul, MN 55101	Christopher W. Madel Robins Kaplan Miller & Ciresi 2800 LaSalle Plaza 800 LaSalle Avenue Minneapolis, MN 55402-2015

Re: *In the Matter of Lake Shore Inn Nursing Home, Inc.*;
OAH Docket No. 15-0900-16027-2

Dear Ms. Miner and Mr. Madel:

I have reviewed the submissions from the Department of Health and from Lake Shore Inn Nursing Home, Inc. (Lake Shore Inn) concerning the facility's right to pursue independent informal dispute resolution (IIDR) for a survey completed on March 29, 2004. For the reasons set forth below, Lake Shore Inn's request for IIDR pursuant to Minnesota Statute section 144A.10, subdivision 16 is dismissed.

Procedural Background

The applicable federal regulation, 42 C.F.R. § 488.331, requires that, for a non-federal survey, the State must offer a facility an informal opportunity to dispute survey findings. Lake Shore Inn asserts that state law allows two reviews, informal dispute resolution (IDR) pursuant to Minnesota Statute section 144A.10, subdivision 15, and IIDR pursuant to section 144A.10, subdivision 16, a position that it has taken consistently since 2004.[1] Moreover, it asserts that it has the right to both reviews in addition to the right to request a hearing directly from the federal certification agency.

It is undisputed that Lake Shore Inn requested both an IDR and an IIDR to review the deficiencies cited in the survey. By letter dated June 2, 2004, Lake Shore Inn also requested a hearing on each of the alleged deficiencies from the federal Department of Health and Human Services (now Center for Medicare & Medicaid Services, "CMS"), Departmental Appeals Board. On July 23, 2004, the commissioner issued a letter, notifying Lake Shore Inn that it had completed the IDR and not changed the survey results.

[1] *See* letters to the Department from Christopher Madel dated April 7, 2004, and May 19, 2004.

The Department scheduled the IIDR for September 1, 2004, but the parties agreed to suspend the proceeding pending settlement discussions.[2]

On October 14, 2005, the Departmental Appeals Board issued its decision, rescinding the citation issued to the facility for failing to have a proper resident call system, F Tag 463, and the related civil penalty.[3] Although Lake Shore Inn had appealed other cited deficiencies, none of them resulted in a civil penalty or other loss to the facility. Prior Appeals Board decisions held that there was no right to hearing on deficiencies that did not result in financial or other loss to the facility.[4] Thus, of the citations Lake Shore Inn challenged, one was reversed by the Departmental Appeals Board, but three others were not addressed. CMS considers that the survey is complete, that no other issues remain.[5]

On September 4, 2007, the undersigned wrote to the Department of Health inquiring about the status of the matter since the IIDR file at the Office of Administrative Hearings was still open. The Department responded on October 24, 2007, that Lake Shore Inn had been given an IDR and had pursued its right to a federal appeal, that the matter was considered closed, and it recommended that the IIDR be dismissed. By letter dated December 6, 2007, Lake Shore Inn opposed dismissal of the IIDR. On December 11, 2007, and January 8, 2008, the Department submitted information in support of dismissal; on December 17, 2007, and January 9, 2008, Lake Shore Inn submitted additional argument in support of its asserted right to IIDR.

Analysis

The Department's authority to conduct surveys for CMS and the IIDR process is created by statute. Thus, the jurisdiction to consider a nursing home's claims must be analyzed in light of the authority that has been given, and not under some general principles that apply to causes of action brought in courts of general jurisdiction.[6]

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[2] Letter to Mary Cahill from Christopher Madel dated August 12, 2004, and letter to Bruce Johnson, Administrative Law Judge, from Mary Cahill, dated August 12, 2004. The file was subsequently assigned to Judge Allan Klein and reassigned to the undersigned.

[3] *Lake Shore Inn Nursing Home, Inc. v. Centers for Medicate & Medicaid Services*, Department of Human Services, Departmental Appeals Board, Docket No. C-04-371, October 14, 2005.

[4] *See* letter to Susan Winkelmann from Robert P. Daly, Manager, Long Term Care Certification & Enforcement Branch, dated January 3, 2008 ("CMS holds, and [Departmental Appeals Board] decisions have upheld, that there is no right to appeal for deficiencies that are not the basis of imposed remedies.").

[5] *Id.*

[6] *See e.g. In the Matter of the Application of Minnegasco*, 565 N.W. 2d, 706, 711 (Minn. 1997).

In its letter of December 6, 2007, Lake Shore Inn opposed dismissal of the IIDR and argued that it had the right to pursue a challenge of Tag 241 in the IIDR, citing four bases for its position. First, it contended that nothing in the state statutes providing for IDR or IIDR requires a facility to choose either a state or federal avenue for review. Lake Shore Inn is correct that the statute does not mention the right to a federal hearing nor does it state or imply that the facility must select one of two options. However, as more fully discussed below, it is apparent that the IIDR is one step in a process that ends with CMS, the federal agency that requires the survey that led to this dispute.

Second, Lake Shore Inn states that since it only litigated one tag in the course of its federal appeal, it cannot be prevented from litigating the others at the state level. In the context of a federal certification survey, this argument must fail. The survey at issue here, conducted under 42 C.F.R. part 488, is conducted by the Department on behalf of the federal government. That is obvious from the language of Minn. Stat. § 144A.10, subdivisions 11 through 16, which tie the Department's activities to the federal certification process, a process which is distinct from the Department's authority based in state statute to conduct inspections and issue a license, appropriate correction orders and fines.[7] IIDR is one step in a process that leads to a final determination by CMS, and is not a separate avenue for appeal.

Third, the facility claims that under principles of federalism, adjudication at the federal level does not dispense with state issues because the federal and state governments are separate sovereigns. As a general matter, the state and federal governments are separate sovereigns, but in matters of federal certification of nursing homes, the state exercises authority as an agent of the federal government and not as a separate sovereign.[8] Thus, there are no "state issues" here; only issues raised in the federal certification survey.

Fourth, Lake Shore Inn objects to the Department's claims that all of the deficiencies could have been addressed in the federal appeal, when, in fact, they could not. However, as stated above, the Department's role is advisory, and CMS makes the final decision. The opportunity to pursue IIDR has no independent basis in state law.

The Department also asserts that Lake Shore Inn was given an informal review under Minnesota Statutes section 144A.10, subdivision 15 and is not entitled to a second review under subdivision 16. Subdivision 15 of the statute allows the facility to request the IDR, which is a review by the commissioner to assure that the commissioner stands by the surveyors' deficiency citations. It is not an "independent"

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[7] *Compare* Minn. Stat. § 144A.10, subdivision 6 and 6b; *See also* subdivisions 6c and 6d, and 42 U.S.C. §1395i-3 (g) and 42 C.F.R. § 488.10.
[8] *See* 42 C.F.R. §§ 488.10 (a), 488.11 and 488.12.

dispute resolution. Subdivision 16 of the same statute states: "Notwithstanding subdivision 15, a facility…may request from the commissioner, in writing, an independent informal dispute resolution process regarding any deficiency citation issued to the facility." If the facility makes the request, the commissioner requests the appointment of an administrative law judge, and the IIDR is conducted according to the process set forth in the statute.

Despite the phrase "notwithstanding subdivision 15," the Department asserts that the facility can request review under either subdivision 15 or subdivision 16, but not both. It cites as its authority a letter to the Department dated April 28, 2005, from Druecilla Brown, on behalf of the CMS Division of Survey and Certification, for the Minnesota region. Ms. Brown wrote:

> Federal regulation is clear that the IDR process gives nursing homes one informal opportunity to dispute cited deficiencies after any survey of Federal requirements for participation in accordance with 42 CFR §488.331 and Section 7212 of the State Operations Manual. In addition, an IDR is a process for facilities to dispute cited deficiencies. Facilities may not use the IDR process to challenge any other aspect of the survey process, including [*inter alia*, scope and severity of deficiencies, with exceptions].

The letter continues: "As the December 16, 2004 S&C 05-10 memo clarified; a second IDR is not offered about the existence of the deficiency(ies) as of the date of the first survey. In other words, a facility may not request a re-review of a previous IDR decision."

In addition to its statement about the right to a single review, the letter also offers a rationale: that the purpose of the informal dispute resolution process is to clarify, if not eliminate, the issues that might lead to needless litigation and to sharpen the issues for a federal administrative law judge, in the event of a federal appeal, so that the litigation will be less burdensome and costly. Moreover, it correctly points out that neither the Department nor CMS is bound by the findings and conclusions of a state administrative law judge. Subdivision 16 explicitly limits the scope of the ALJ's findings and states that the findings are not binding on the commissioner.[9]

The letter from CMS does not squarely resolve the question here. By enacting both subdivisions 15 and 16, the Legislature apparently provided two avenues by which the commissioner will form a recommendation to CMS about the cited deficiencies. Whether the two are exclusive, as the Department argues, or both can be employed

[9] Minn. Stat. §144A.10, subd. 16 (d).

prior to the commissioner forming a recommendation, as Lake Shore Inn argues, need not be resolved in this instance. Instead, the key to the analysis here is whether there is any opportunity remaining for the commissioner to make a recommendation to CMS, or whether the opportunity was foreclosed by Lake Shore Inn's decision to pursue its appeal to the CMS Departmental Review Board, and that body's final decision. Lake Shore Inn's fourth argument is that it has a right to pursue the remaining claims in IIDR that could not be argued to the CMS Departmental Appeals Board.

Although the interplay of the state and federal law is not entirely clear, the decision of the Minnesota Court of Appeals addressing a related question is instructive.

In *In re Elim Home Princeton*, the Court of Appeals granted the Respondent's motion to discharge a writ of certiorari. It found that state survey agencies are required to offer nursing homes an informal dispute resolution process pursuant to 42 C.F.R. § 488.331(a) and that the state survey findings serve as recommendations to CMS regarding whether nursing facilities meet the Medicare requirements of participation, citing 42 C.F.R. § 488.10(a)(1) and § 488.12. If a facility fails to substantially comply, CMS can take action against the nursing home.

The Court of Appeals determined that a request for independent review may be submitted to the administrative law judge, pursuant to Minn. Stat. § 144A.10, subd. 16(a), but since neither the decision of the ALJ, nor the commissioner's decision is binding, and because the nursing home could choose the alternative federal hearing process, the commissioner's decision was not reviewable by writ of certiorari. As the Court of Appeals pointed out, even if the nursing home was entitled to the contested case hearing that it had demanded, there would be no effective relief because the commissioner's decision would not be binding on CMS. If the commissioner's decision was not binding, it was not reviewable by the Court of Appeals. It concluded that an issue was effectively moot if no award of effective relief were possible.

Although Elim Home Princeton's request differed from Lake Shore Inn's request, the same logic applies. The issues that Lake Shore Inn wants to pursue in IIDR under section 144A.10, subd. 16, are effectively moot. Even if the IIDR were undertaken and the ALJ issued a recommendation that the citations should be overturned, and even if the commissioner agreed, CMS has stated that the survey is closed and no changes will be made.[10] If no relief can be given, the appeal is moot.[11] Moreover, denying IIDR is logical under the circumstances. Although an argument may be made that a facility is entitled to both IDR and IIDR, the facility did receive one opportunity for informal dispute resolution, as required by federal law. Moreover, Lake Shore Inn selected the federal

[10] Letter to Susan Winkelmann from Robert P. Daly, *supra*.
[11] *See In the Matter of the Application of Minnegasco, supra* at 710.

forum and attempted to raise the same issues in that forum. It is not unfair to impose the limitations of the selected forum. In addition, there is no penalty associated with the citations that remain.

Since CMS will not consider any recommendation from the commissioner and no award of effective relief is possible, the issue is moot, the IIDR will be dismissed, and our file closed.

Sincerely,

/s/ Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

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